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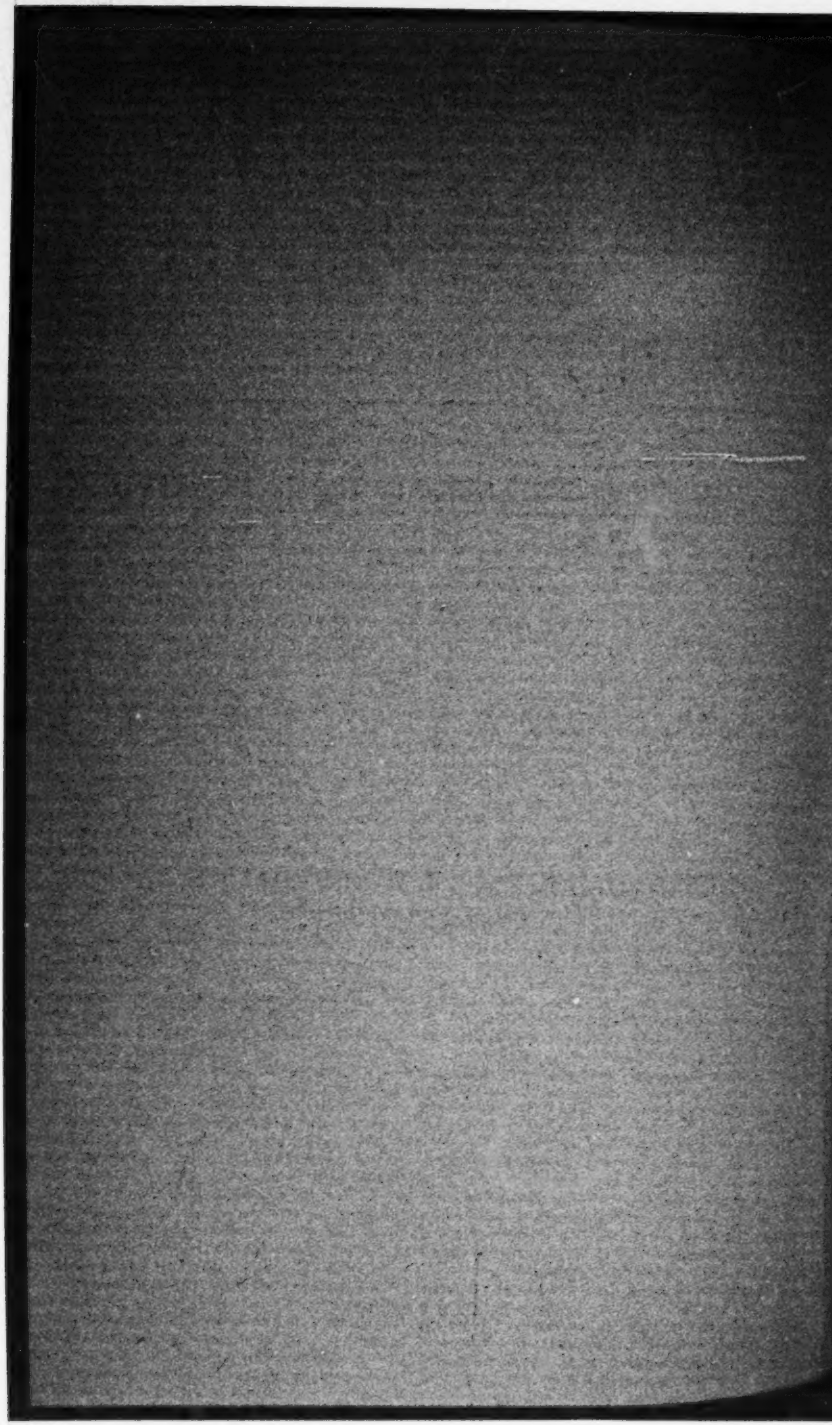
IN THE SUPREME COURT OF THE UNITED STATES

W. L. WELLS COMPANY, Petitioner,

against

GASTONIA COTTON MANUFACTURING COMPANY, Respondent.

Brief of Murray F. Smith, H. C. Jones and Chas. W. Tillett, Counsel for Petitioner.



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RESPONDENT.

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PRELIMINARY STATEMENT.

It will appear by reference to the petition for *writ of certiorari* and to the record in this action that the petitioner alleges that it is a corporation created under the laws of the State of Mississippi, and therefore a citizen of the State of Mississippi, and that the defendant is a corporation created under the laws of the State of North Carolina, and therefore a citizen of that State. The action was brought in the Circuit Court of the United States for the Western District of North Carolina by the petitioner, alleging diverse citizenship as a ground of jurisdiction; and this action and one of like nature against Avon Mills (the determination of which awaits the decision in this case) were brought to recover the sum of about sixty-five thousand dollars ($65,000) due for cotton purchased by the defendant and the Avon Mills from the plaintiff. The defendant denied that the plaintiff was a corporation and a citizen of the State of Mississippi. It admitted that it purchased the cotton from the plaintiff at the prices therein named and it set up the plea of partial payment, and admitted it owed a balance.

It is admitted by us that the denial of the corporate existence of the plaintiff and the denial that it was a citizen of the State

of Mississippi raised in the Circuit Court the question of jurisdiction, and this question was passed upon by the Circuit Court in favor of the plaintiff. The Circuit Court also ruled that the defendant had wholly failed to make out its plea of payment, and in as much as the defendant admitted the debt subject to the plea of payment, the Court directed a verdict for the full amount of the plaintiff's demand.

The case was carried by writ of error, sued out by the defendant, to the Circuit Court of Appeals to review the alleged errors of the Circuit Court, first in that the Circuit Court held that it had jurisdiction of the case, and second that the Circuit Court held that the plea of payment had not been sustained.

REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED.

It is apparent that the question upon which the decision of the Circuit Court and also the decision of the Circuit Court of Appeals turned was one of jurisdiction. The Circuit Court sustained the jurisdiction upon the ground that the plaintiff was a corporation of the State of Mississippi, and therefore a citizen of that State. The Circuit Court of Appeals reversed the Circuit Court upon this point, and while conceding that the plaintiff was a *de facto* corporation, yet ruled that the Court had no jurisdiction because the plaintiff was not a *de jure* corporation. In other words, the important ruling of the Circuit Court of Appeals, which this Court is asked to review, is whether the Federal Court can inquire into the legality of corporate existence, or whether, if it is shown that a party is a corporation *de facto*, this is conclusive upon the question of the right of such corporation to sue as a citizen of the state under which it was organized and in which it has been doing business.

The case then being one in which the jurisdiction of the Federal Court is involved, it could have been brought directly from the Circuit Court to the Supreme Court under the provisions of the fifth section of the Act of March, 1891. *Shepherd vs. Adams, 168 U. S., 618.* The defendant elected to take the case to the Circuit Court of Appeals instead of bringing it to the Supreme Court upon the jurisdictional question. And the de-

cision of the Circuit Court of Appeals is therefore final unless the Supreme Court should review it upon this petition for certiorari. *Robinson v. Caldwell, 165 U. S., 359.*

If the decision of the Circuit Court had been against the plaintiff upon the question of jurisdiction, the plaintiff likewise could have brought the case directly to the Supreme Court for the determination of that question, and it is now submitted that it is a reason appealing most strongly to the Court for the exercise of its discretion in granting this application for certiorari, that the plaintiff, without any fault on its part, has lost the opportunity *as a matter of right* to have the Supreme Court pass on the question of jurisdiction.

We have found no decision of the Court in which this phase of the question has been treated, but it is earnestly submitted that the Supreme Court should be more favorable to granting of writs of certiorari for the purpose of passing upon questions of jurisdiction where the party applying for the writ was deprived of the opportunity of having the case brought to the Supreme Court by reason of the fact that the decision of the Circuit Court on the jurisdictional question was in his favor.

With this preliminary statement we submit that the Court should grant the writ of certiorari for the following reasons:

1. It is conceded in the opinion of the Circuit Court of Appeals, and, as we understand, is admitted on all sides, that the plaintiff is at least a de facto corporation; and if this be admitted or shown to be true, then there was manifest error in the opinion of the Circuit Court of Appeals in holding that the corporate existence of the plaintiff could be attacked in this action, and in holding that the Federal Court has no jurisdiction of an action brought by a de facto corporation.

2. There was error in the ruling of the Circuit Court of Appeals to the effect that the plaintiff was not a de jure corporation. The Court confused the corporate existence with the franchise to do business. Under the first section of plaintiff's charter, which the Circuit Court of Appeals entirely ignored, the plaintiff was created a corporation by words in praesenti.

3. The Circuit Court of Appeals was also in error in ruling that the payment of ten thousand dollars ($10,000) of capital stock was a condition precedent to the granting of the franchise to do the business of general dealer in cotton; and the Court further ignored or overlooked the fact that at the time of the transactions out of which the cause of action arose the plaintiff company had in its treasury, of profits realized, a sum largely in excess of ten thousand dollars ($10,000).

DISCUSSION OF POINTS INVOLVED.

1. It is conceded in the opinion of the Circuit Court of Appeals, and, as we understand, is admitted on all sides, that the plaintiff is at least a de facto corporation; and if this be admitted or shown to be true, then there was manifest error in the opinion of the Circuit Court of Appeals in holding that the corporate existence of the plaintiff could be attacked in this action, and in holding that the Federal Court has no jurisdiction of an action brought by a de facto corporation.

Although it would possibly be more logical to discuss first the alleged error of the Circuit Court of Appeals in deciding that the plaintiff was not a corporation *de jure*, yet we prefer to discuss first the proposition that, granting for the sake of argument that the plaintiff is not a corporation *de jure*, but, as the Circuit Court of Appeals concedes, is only a corporation *de facto*, then that the Court has jurisdiction, that the plaintiff as a *de facto* corporation is a citizen of the State of Mississippi and that the Court can not in an action of this nature inquire into the legality of the corporate existence.

The plaintiff company was undeniably a *de facto* corporation. The Circuit Court of Appeals in its opinion says that in order for the plaintiff to have standing in the Circuit Court of the United States it must "show the credentials of its birth and existence." It is submitted that the plaintiff has shown these "credentials" by the strongest possible proof.

The error of the Circuit Court of Appeals consists as we respectfully submit in the failure to advert to the fact that a *de facto* corporation has a real existence, is an entity, and does

not owe its existence merely to a question of estoppel. The Supreme Court has most clearly defined the nature of a *de facto* corporation in the case of *Tulare Irrigation District vs. Shepard*, 185 *U. S.*, 1, where it is said "from the authorities some of which are above cited it appears that the requisites to constitute a corporation *de facto* are three: (1) A charter or general law under which a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise."

We could rest our whole case upon this clear enunciation of "the requisites to constitute a corporation *de facto*." The W. L. Wells Company undoubtedly (1) obtained a charter "under which it might lawfully be organized," (record p. 42); and (2) it undoubtedly made "an attempt to organize thereunder," (record p. 45); and (3) there was undoubtedly "an actual user of the corporate franchise."

When the company was shown to have had this *de facto* existence, then there could be no collateral inquiry into the regularity of the existence. The very fact that it is called a *de facto* corporation presupposes that there is some irregularity in its organization; but it is nevertheless an *actual corporation* and has *actual existence* which can not be collaterally attacked.

In the opinion of the Circuit Court of Appeals it is said that where the corporate existence is denied, that is a direct attack on the existence and is permissible in a case of this character. It is respectfully admitted that a moment's consideration will show the error of the Court; for every attack upon a corporate existence except one made by the state itself is necessarily collateral. If the corporate existence could be called in question merely by denying it and this would be considered a direct attack, then there is error in all of the thousands of cases in which the Courts have held that the corporate existence could not be called in question merely by denying it in a civil action. All of the authorities agree that such a denial is a collateral attack upon the corporate existence.

In the case of *Tulare Irrigation District vs. Shepard*, 185 *U. S.*, 1, already cited, the Court said "being a *de facto* corpora-

tion the general rule is that none but the state can call its existence in question."

And the Court then quotes with approval Cooley Const. Lim., p. 312, as follows:

"In proceedings where the question whether a corporation exists or not arises collaterally, the Courts will not permit its corporate character to be questioned, if it appear to be acting under color law, and recognized by the state as such. * * * And the rule, we apprehend, would be no different if the Constitution itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the state, *and private parties could not enter upon any question of regularity.* And the state itself may justly be precluded, on the principle of estoppel, from raising such an objection, where there has been long acquiescence and recognition."

In *Baltimore and B. P. Company v. Fifth Baptist Church,* 137 *U. S.,* 658, the right of defendant in error to bring a suit as a corporation was questioned, and the Court held that the evidence before it was clearly competent and sufficient, as between these parties, to prove that the plaintiff "had, in good faith, attempted to organize as a corporation, and had long acted as such, and was, at least, a corporation *de facto, which is all that is necessary to enable it to maintain an action against anyone, other than the state, who has contracted with the corporation or who has done it a wrong.*"

In case of *Stout v. Zulick, 48 N. J. Law, 599,* we find the doctrine we are contending for in the following languages:

"And it is entirely settled that the corporate existence of such corporation *de facto* can not be inquired into collaterally. It is, as to all who contract with it, to be assumed to be a corporation *de jure.* The legality of its corporate existence may be inquired into by the state; but not by any one else. And this is as true where the corporation is formed under a general law as it is where the corporate existence is claimed under a special charter."

And likewise in *Trustees vs. Froislie,* 37 *Minn.,* 447, we find the following pertinent language:

"The plaintiffs are at least corporation *de facto*. Such a corporation, at least where there is a law under which a corporation might have been legally formed with such power, is capable of taking and holding property as grantee, as well as a corporation *de jure*, and conveyances to it are valid as to all the world, except the state in proceedings in *quo warranto*, or direct proceedings to inquire into its right to exercise corporate franchises. And in an action by it to recover such property, no private person will be allowed to inquire collaterally into the regularity of its organization. This rule is not founded upon any principle of estoppel, as is sometimes assumed, but upon the broader principles of common justice and public policy. It would be unjust and intolerable if, under such circumstances, every interloper and intruder were allowed thus to take advantage of every informality or irregularity of organization."

From these authorities and hundreds of others that might be cited, it is apparent that when the honorable Circuit Court of Appeals says that the attack made on the corporate existence of the W. L. Wells Company is not a collateral attack, it is at variance with all the authorities and stands alone.

CAN DE FACTO CORPORATION MAINTAIN SUIT IN FEDERAL COURT?

We come then to the question as to whether a *de facto* corporation can maintain a suit in the Federal Court as a citizen of the state under the laws of which it attempted to organize.

We call attention in the first place to the fact that in all of the authorities cited a *de facto* corporation is spoken of as having a real existence. The very use of these words presupposes that it is a legal entity, and if so then it must be a citizen of some state.

This idea is clearly expressed in the leading case of *Society Perun vs. City of Cleveland*, 43 *Ohio St.*, 481 (3 *N. E.*, 357), where it is said: "The argument is that 'no case can be found where it is held that there is a corporation *de facto* against persons who have in no way recognized its existence as a corporation;' and that 'the notion of a *de facto* corporation is based on the doctrine of estoppel; when estoppel can not be invoked, there

can be no *de facto* corporation.' The theory that a *de facto* corporation has no real existence, that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority. A *de facto* corporation is a reality. It has an actual and substantial legal existence. It is as the term implies, *a corporation.* * * * * "Where it has attempted, in good faith, to assume corporate powers; where its proceedings in that behalf are colorable, and are approved by those officers of the state who are authorized to act in that regard; where it has honestly proceeded for a number of years, without interference from the state, to transact business as a corporation; has been reputed and dealt with as a duly incorporated body, and valuable rights and interests have been acquired and transferred by it, *no substantial reason is suggested why its corporate existence, in a suit involving such transactions, should be subject to attack by any other party than the state, and then only when it is called upon, in a direct proceeding for that purpose, to show by what authority it assumes to be a corporation.*"

It would seem then that there should be no controversy but that a *de facto* corporation is a "citizen" within the meaning of the Federal Statutes which confer jurisdiction on Federal Courts in cases of diverse citizenship. This would be true if the strictest interpretation of the word was required, but the interpretation placed by the Federal Courts upon the word "citizen" (in regard to corporations or quasi-corporations) has been that of great liberality. Thus as said in Carter's Jurisdiction, Federal Courts p. 56, "a majority of cases have held that what are known as joint stock companies may be treated as citizens of the states under whose laws they are organized for all purposes." This was the ruling of Judge Gresham in the case of *Fargo vs. Louisville, etc., R. R., 6 Fed., 787,* and *B. & O. R. R. Company vs. Express Company,* 22 *Fed.* 404. It is also held that a limited partnership may sue as a corporation in the United States Courts. See able and elaborate discussion of the question in *Andrews Company vs. Youngstone Company,* 86 *Fed.,* 585. (*C. C. A.*) See also *Board of Chicot City vs. Crit-*

tenden, 94 *Fed.*, 613, where a Levee Board was allowed to maintain suit as a corporation.

But we find a case directly in point in *Blackburn vs. Selma, etc., R. R. Company, 2 Flipp, 525 (Fed. Cas., No. 1467).* There the defendant sought to evade the jurisdiction of the Federal Courts upon the ground that it was not regularly organized as a corporation; and the very point discussed by the Circuit Court of Appeals in the case at bar was passed upon. The Court says: "It is claimed that the question here is one of jurisdiction, and therefore this doctrine of estoppel does not apply, however it may be in a case where the defence is *non est factum* or some other plea to the merits. * * * *We can not see why this estoppel is not as conclusive to support the jurisdiction as to support the contract.* If a body of citizens shall assume to act as a Tennessee corporation, keep its headquarters and principal offices here as this did, execute bonds and mortgages including property lying in Tennessee, and reciting and showing its Tennessee charter and Legislature as a part of its authority to do these acts, we do not see why its estoppel by them to deny its Tennessee citizenship as well when the Tennessee jurisdiction depends upon it, as when the validity of its contract is called in question. * * * We say, then, that when parties act as a corporation in Tennessee, and claim to be a Tennessee corporation and deal as such, they are estopped to deny that the corporation is a Tennessee corporation when sued in the Federal courts of that State; and they can no more aver their non-user or non-acceptance of the charter under which they have assumed to act against the jurisdiction of the Court in which the corporation is sued than they can aver the fact against the contract itself."

In the leading case of *Louisville, etc., R. R. v. Letson*, 2 Howard, 497, will be found the theory upon which corporations are held to be citizens for jurisdictional purposes: The learned Justice says: "If it (*i. e.*, a corporation) is so (a citizen) for purposes of taxation, why not for purposes of suit in the Federal Court? * * * When a corporation *exercises its powers* in in the State in which it was chartered, that is its *residence*, and such an averment is sufficient to give the Circuit Courts jurisdiction."

If, then, as in the case at bar, the Wells Company was allowed to exercise its corporate powers in the State of Mississippi, then certainly under the liberal construction placed upon the word "citizen" in reference to corporations, this company should be deemed such for all jurisdictional purposes. In support of this construction we find in *Kansas, etc., R. R. v. Santa Fe R. R., 118 U. S., 414*, the following: "In all cases where a Federal court can take jurisdiction of controversies between citizens, it will take jurisdiction of controversies between corporations and *treat them* as citizens of the State under whose laws they were created or *continue to exist.*" If the State of Mississippi permits the Wells Company to exist and exercise corporate powers, it should be deemed a citizen.

In *Handley v. Stutz*, 39 U. S. (Law Ed., 35, p. 229), a suit was brought in Tennessee by certain creditors of the Clifton Coal Company to enforce certain contracts made by that corporation (by citizens of Tennessee, presumably). The Clifton Coal Company had been organized in Kentucky, and the defendant contended that there had been certain irregularities not in accordance with the Kentucky statute, in regard to the capital stock, directors' meetings, etc. The Court held that "under the Kentucky statute a person dealing with a corporation and sued on a contract, can not defend on the ground of a want of legal organization of the corporation." A reading of the opinion will show that the words "under Kentucky statute" are unimportant. If the Court had the power in all suits to look into the organizations of *de facto* corporations before taking jurisdiction, why did it not refuse to recognize the right of the Kentucky corporation to sue in Tennessee until satisfied as to the regularity of its organization? The point would certainly have been raised long before this, had the Federal courts possessed such a power, but not a single case can be found to this effect.

In *Commrs. v. Bolles*, 94 U. S., 104, it is held that "where there is a corporation *de facto*, if not *de jure*, its *corporate existence* and its ability to contract can not be *called in question* in a suit brought upon evidences of debt given to it."

We would call special notice to the words used here. Not only is the proposition laid down that a party dealing with a

de facto corporation can not defend upon ground of irregular organization, but the broadest rule is declared that *no question whatsoever* is to be raised as to the existence of a *de facto* corporation in an action upon evidence of debt. In *Fritz v. Palmer,* 132 U. S., 282: 33 Law Edition, 317, a Missouri corporation, The Comstock Company, was one of the parties interested in a suit in Colorado in regard to certain real estate situate in the latter State, and it was contended that the Comstock Company had not legal capacity to purchase, hold or convey real estate in Colorado. The Court held that the question whether a corporation has taken title to real estate for purposes not authorized by law or in excess of the quantity permitted by its charter concerns *only* the *parent* State; thus the Court absolutely refused to inquire into the relations which exist between a foreign corporation and the State in which it has its existence. This, we contend, has been and should be the attitude of the Federal judiciary as to the question of corporate citizenship. For citizenship as to jurisdiction over corporations means only residence. In support of this contention, see note to *Steamship Co. v. Trigman,* 106 U. S., 27 Law Ed., 87, upon corporate citizenship, citing *Gassies v. Ballow,* 31 U. S., 961, and other cases.

In the Federal Courts there are a number of cases in which *de facto* corporations have been allowed to sue and be sued. Since the question of jurisdiction lies at the threshold of every action, it seems almost incredible that this point should not have been raised, and that some of the judges should not have refused to recognize the existence of *de facto* corporations, according to the contention of the defendant. Especially worthy of notice is the case of the *Young, etc., Co. v. Young Lock-Nut Co.,* 72 Fed. Rep., 63. An action was brought in New Jersey by the plaintiff, a New York corporation; defendant contended that the action could not be maintained because of plaintiff's non-compliance with a New York statute as to capital stock and subscriptions. The Court held that the action might be maintained for "a failure to comply with the statute would not, *ipso facto,* and in the absence of an action by the State, work a dissolution of the corporation or prevent it from recovering its property."

Another strong case is that of *Am., etc., Co. v. City of New*

York, 68 Fed., 227, where it is held that "when a corporation has been organized and taken title to a patent, and no proceeding has been taken to terminate its existence, it may *maintain a suit*, notwithstanding defendant company questions its corporate existence on ground of failure to seasonably commence business."

In *Moxie Food Co. v. Baumback, 32 Fed., 205*, it was contended by defendant that, because certain conditions on the part of plaintiff relative to citizenship of incorporators and manner of manufacturing the products had not been complied with, therefore the Moxie Company, chartered in Maine, was no corporation, and not entitled to sue in the Federal courts in Texas. The Court, after conceding for the purpose of argument, the violations of the conditions, used the following striking language:

"If it had an existence in Maine, it can *sue* (*i. e.*, in Texas). Clearly it had and has an existence in Maine. Whether it manufactured elsewhere in whole or in part is a matter purely between itself and the State of Maine. Maine, its sovereign power, created it a *citizen for all purposes of suit*, * * * and it is for her to deal with this person so far as its *existence* is concerned. It is the only power that can call its existence in *question* when that *existence* has once been actually created. When that certificate was filed in the Secretary of State's office, it was a being. * * * It is a thing of life; it can sue and be sued." Continuing, the Court said: "Is it (*i. e.*, the violation of conditions) not *exclusively* a matter between itself and its parent? I think it is. When it sues in a court, the only question the *Court can try* is, not whether it has disappointed the reasonable expectations of its parent, or creator, but whether, *in point of fact*, such person has a legal existence. If it has, the suit must go on."

In *Oregon, etc., Ry. v. Oregon Ry. and Nav. Co.*, 23 Fed. Rep., 232, the plaintiff, a corporation *ostensibly* formed (defectively) in Great Britain, sued defendant, an Oregon corporation, in that State, and defendant defended on ground that plaintiff was no corporation, specifying grounds for its belief, plaintiff merely demurred to answer and seems not to have offered proofs of its incorporation. Court held, however, that defendant was estopped to deny the existence of an *ostensible*

corporation with which it has contracted. The action was brought in the Circuit Court of Oregon in 1885 upon a lease. It must have been brought under the act of 1883, and surely if the Circuit Court had possessed any power to inquire into the regularity of corporate organization, it would have done so before taking jurisdiction of this ostensible British corporation against a citizen of Oregon.

The principles of estoppel, proof of *de facto* existence, and the non-allowance of collateral attack, run so close together in many of the cases that it seems hardly necessary to separate them. In the following cases, however, it is held in *ipsissimis verbis* that a *de facto* corporation can not be collaterally attacked or questioned except in a direct proceeding for that purpose by the parent State:

Armour v. E. Bements, etc., 123 Fed. Rep., 56;
Ryland v. Hallinger, 117 Fed. Rep., 216;
Am. etc., Co. v. City of N. Y., 68 Fed. Rep., 227;
Miller v. Perry, etc., District, 85 Fed. Rep., 693;
Andrews v. Pipe and Foundry Co., 77 Fed. Rep., 774;
Young Rev. Lock Co. v. Young, etc., Co., 72 Fed. Rep., 67;
Lessee of Frost v. Frostburg, etc., Co., 65 W. S., Law Ed., p. 637;
Columbia, etc., Co. v. Freem, etc., 71 Fed. Rep., 392;
Jones v. Habersham, 107 U. S., 27 Law Ed., 403;
Moxie Food Co. v. Baumtack, 32 Fed. Rep., 205;
Fritz v. Palmer, 132 U. S., 25 Law Ed., 1050;
Whitney v. Wyman, 101 U. S., 25 Law Ed., 1051;
Macon v. Shores, 97 U. S., 24 Law Ed., 890;
Ralls County v. Douglass, 101 U. S., 26 Law Ed., 958.

In the following cases it has been held that proof of *de facto* corporate existence is all that is necessary to maintain an action in a Federal Court:

Balto. and P. R. R. v. Baptist Church, 137 U. S., 568;
Bank of U. S. v. Dandridge, 25 U. S., 64;
Conrad v. Ins. Co., 26 U. S., 386;
Tulare Irrigation Dist. v. Shepard, 185 U. S., 46 Law Ed., 773.

In the following cases, the parties to suit or action have been held to be estopped to set up the irregularity of the corporate organization of a *de facto* corporate body, which was party to the suit:

Bank v. Matthews, 98 U. S., 621;
Wallace v. Loomis, 97 U. S., Law Ed., 24, p. 895;
Automatic, etc., Co. v. N. Am., etc., 83 Fed. Rep., 232, p. 1;
Chubb v. Upton, 95 U. S., 65;
Close v. Cemetery, 107 U. S., 27 Law Ed., 409;
Oregon, etc., Ry. v. Oregon, etc., Ry., 23 Fed. Rep., 232.

Though we have attempted to carefully distinguish these cases on account of their wording and difference of statement, nevertheless through them all there runs the one great fundamental principle with which we began this argument, namely, that a *de facto* corporation is as real a legal entity or person, to all intents and purposes, as a *de jure* corporation, except when its existence is brought into question by a direct proceeding on the part of the parent State. Therefore, the conclusion almost irresistably follows that if the Wells Company was a *de facto* corporation in Mississippi, the Federal courts are bound to recognize it as a citizen of Mississippi for all purposes of jurisdiction, since as long as the parent State of Mississippi continues to treat this corporation as its legitimate child no one else has the right to say that it is an illegitimate.

2. There was error in the ruling of the Circuit Court of Appeals to the effect that the plaintiff was not a de jure corporation. The Court confused the corporate existence with the franchise to do business. Under the first section of plaintiff's charter, which the Circuit Court of Appeals entirely ignored, the plaintiff was created a corporation by words in praesenti.

THE PLAINTIFF A CORPORATION *DE JURE*.

We have argued the alleged error of the Circuit Court of Appeals upon the assumption that that Court was right in ruling

that the Wells Company was only a *de facto* corporation, but we now submit, with the utmost confidence, that the undisputed facts in the case show that the plaintiff was a corporation *de jure*, brought into existence in the strictest legal conformity with the provisions of the State of Mississippi.

We call attention to the first section of the plaintiff's charter (record, p. 42), in which the incorporators "are hereby created a body politic and corporate." No language could be used which would more strongly grant by words *in praesenti* a grant of corporate existence. The Mississippi statute, which is set forth in the petition for *writ of certiorari*, provides: "The powers therein specified shall, by the approval of the charter, be vested in such corporation, and it shall go into operation at the time and on the terms and conditions therein specified." This provision would seem to imply that it was only necessary that the Governor approve the charter in order that the powers therein specified be vested in the corporation. But however this may be, certainly no one can doubt but that when the incorporators met as they did and formally accepted the charter (record, p. 45), then a full-fledged *de jure* corporation came into existence. It may be that this corporation was not fully empowered to go into the cotton business until ten thousand dollars ($10,000) of stock was paid in, but nevertheless it had in the strictest sense a legal existence as a corporation, and became a citizen of the State of Mississippi as much so as a child born in Mississippi of parents residing there. Indeed, in this aspect of the case, it may well be likened to such a child, who undoubtedly had at its birth a legal existence and became a citizen of the State of Mississippi, and yet could not transact any business whatever. We are conceding here, for the sake of the argument, that the payment of ten thousand dollars ($10,000) capital stock was a condition precedent to its right to do business. We shall presently show, however, that this is not a proper interpretation of section two of the chapter. It will be noted that in the opinion of the learned Circuit Court of Appeals the first section of the plaintiff's charter was entirely ignored or overlooked in the discussion by the Court of the question at issue. It is respectfully submitted that the Court confused the question of the corporate

existence with the question of the right of the corporation to do the business for which it was organized, viz., that of general dealer in cotton. This distinction is very clearly drawn by the Supreme Court in the case of *Julian v. Central Trust Company and the Southern Railway Company*, in opinion filed on February 23, 1904. This case cites with approval the case of *Memphis R. R. Company v. Commissioners, 112 U. S., 819*, where it is said "the essential properties of corporate existence are quite distinct from the franchise of the corporation. The franchise of being a corporation belongs to the incorporators; while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises."

It is plain, we submit, that the incorporators acquired "the franchise of being a corporation," when the charter was granted and the corporators accepted it, although it may be conceded for the sake of argument that the corporation itself did not acquire the franchise of doing a cotton business until the ten thousand dollars ($10,000) of stock was paid in. If the corporate existence was complete then, the plaintiff undoubtedly became a citizen of the State of Mississippi within the meaning of the U. S. statutes which give the Federal courts jurisdiction in cases of diverse citizenship.

It may not be denied that there are charters granted which, by their terms, forbid that the "franchise of being a corporation" shall be assumed by the incorporators until certain conditions precedent have been complied with. But we submit that the case at bar does not by the most strained construction of its charter fall in that class. As before stated, there was nothing for the corporation to do to attain a legal existence except possibly for the incorporators to accept the charter, or do some act showing that they accepted it. In the case of *Perkins v. Sanders, 56 Miss., 733*, the question at issue is very ably discussed. The Court, speaking of the charter under discussion, says:

"The charter of this company is not of that character. By

the first section of it, 'and all others who are now or may hereafter become associated with them, and their successors and assigns, be, and they are hereby, created a body politic and corporate, under the name and style of the Perkinsville Manufacturing Company,' etc. This was no proposition to create a corporation under the performance of precedent conditions, but it was itself the creation of a corporation, requiring no other act to be performed by the corporators than their acceptance of the charter; and this, even, was unnecessary, if, as it is probable, the corporators had applied for the grant of the charter, and thus accepted it in advance. Action under the charter would be an acceptance of it, and hence there could never be any question as to the existence and due organization of the corporation when determining upon the validity of a corporate act done within its charter powers; for the performance of the act itself would be an acceptance of the charter.

"The distinction between the two classes of charters is thus seen to be that in the first class the charter is a mere permission on the part of the Legislature for the formation of a corporation, upon the doing of certain acts prescribed in the charter as precedent conditions, and, as a necessary result, no corporate act can be done until these conditions have been performed, except such as may be expressly permitted by the charter; and to those acts, it would be considered that the corporation had an existence before its full investure with its corporate franchise.

"In the latter class, in which is this company, the corporation is in existence, for all the purposes of its creation, from the beginning, except so far as there may be restraints placed on it by the charter, either expressly or by plain implication."

In the case of *St. Joseph, etc., R. R. v. Shambaugh, 166 Mo., 567*, the Court uses this language: "The charter confers corporate capacity without condition precedent, and acceptance of the charter is all that need be shown. In such cases, the act of incorporation brings the corporate body into existence. The act of January 22, 1857, declares that there is hereby created a company, called the St. Joseph and Iowa Railway Company, with a capital stock of $2,000,000, and then goes on to designate

the persons who shall constitute the first board of directors. No conditions are prescribed. It is a present grant of corporate powers."

Numberless other authorities could be cited to the same effect, but it is submited that in view of the plain provisions of the charter of the plaintiff, the first section of which creates it a corporation without condition precedent, it is unnecessary to multiply decisions.

3. The Circuit Court of Appeals was also in error in ruling that the payment of ten thousand dollars of capital stock was a condition precedent to the granting of the franchise to do the business of a general dealer in cotton; and the Court further ignored or overlooked the fact that at the time of the transactions out of which the cause of action arose the plaintiff company had in its treasury of the profits already realized a sum largely in excess of ten thousand dollars.

(*a*) We have already endeavored to show that the existence of the corporation was in no sense dependent upon the company's right to do business, conceding that by a proper interpretation of the second section of the plaintiff's charter the payment of ten thousand dollars of capital stock was made a condition precedent to its right to do business. We now submit that a proper interpretation of the second section, along with the remaining sections of the charter, clearly shows, not only that the right of existence as a corporation was not dependent on the payment of ten thousand dollars of capital stock, but also that the payment of this amount of capital stock was not even a condition precedent to the right of the company to do the business for which it was organized, viz., that of general dealer in cotton.

The language of the second section of the charter (record, p. 42) is: "As soon as ten thousand dollars of said stock is subscribed and paid for, said corporation shall have power to commence business." It is submitted that this language does not make the payment of the ten thousand dollars a condition precedent to the right to commence business.

In the case of *Whitney v. Wyman, 101 U. S., 392*, the statute under which the corporation in question was organized declared

that the articles of association should be filed with the Secretary of State before the corporation should commence business. The corporation attempted to do business before its articles were filed as required, and the Court, discussing this phase of the case, among other things, said: "The restriction imposed by the statute is a simple inhibition. It did not declare that what was done should be void, nor was any penalty prescribed. No one but the State could object."

In the case of *Hammond v. Strauss, 53 Md., 1,* there was a charter strikingly like the one in the case at bar, except that its prohibitive features were much stronger. The Court said: "An act of the Legislature of the State of Maryland, by the first section, declared the parties therein named and their successors in office to be, and they are hereby, constituted and made a body corporate and politic, under the name and style of The Union Banking Company of Baltimore." The fourth section of this act provided that when "twenty-five per cent of the minimum capital stock shall have been paid in and so certified by the majority of said corporation, to the Treasurer and Comptroller of the State, and a certificate of their organization transmitted to the Court of Appeals to be by him recorded in his office, and *not before* shall they be entitled to all the benefits and privileges herein conveyed or intended to be conveyed." This twenty-five per cent was not paid in and no certificate was filed, yet the Court in that case uses this language: "There is nothing in this language that imports a condition precedent to the existence of a corporation." Further along the Court said: "As we have seen the act by its terms constitute and declare the incorporators therein named a body corporate; and upon their acceptance of the act, if it was accepted, the corporation was brought into existence without anything more, by the force of the statute itself. There was no condition precedent prescribed to the mere existence of the corporation, after the acceptance of a charter, and in such cases it has often been decided that the corporation is *in esse.*"

And in the case of *Harrod v. Hammer, 32 Wis., 162,* the following language is used: "The corporation was organized under chapter 73 of the Revised Statutes. It is not objected

or shown that any requirements of the statute was omitted or not complied with, except only that the certificate prescribed by section 17, and was not made and deposited with the Secretary of State, and a duplicate with the village or city clerk, as therein directed. The only question, therefore, is whether this failure of the president and directors to make and deposit the certificate and duplicate, operated to defeat the organization or to annul the proceedings by which the corporation was brought into existence. The very words of the section are a sufficient answer—'That before any corporation, formed and established by virtue of the provisions of this law, shall commence business, the president and directors shall cause their articles of association to be published,' etc., and 'shall make a certificate,' etc. It would not be easy by any words to recognize the existence of the corporation without the publication and without the certificate, or before they are made, more clearly than has been done here. The corporate existence is clearly acknowledged, and intended to be so, and the prohibition is only against it commencing business until the requirements are complied with. It is spoken of as a corporation formed and established by virtue of the provisions of law."

We deem it unnecessary to present any further authorities, and submit that the provisions of the second section of the plaintiff's charter in regard to its commencing business, was, as the Supreme Court of the United States says in the case of *Whitney v. Wyman, supra,* "a simple inhibition."

(*b*) Discussing the second branch of the third proposition upon which we rely, we call the attention of the Court to the fact that in the discussion of the questions at issue the Honorable Circuit Court of Appeals did not give the proper weight, if any at all, to the admitted fact that at the time of the transactions out of which the cause of action arose, the company had already made net profits amounting to $37,000, all of which was still in the treasury except about $4,000, drawn out by two of the stockholders (see testimony of Jno. T. Wells, record, p. 34). Besides this, it was shown that before the company did any business at all, W. L. Wells had loaned the company $10,000 (record, p. 34).

Conceding that the company was compelled to have capital amounting to $10,000 before it commenced business, it is difficult to see why this requirement was not complied with as soon as the company had realized net profits aggregating that amount, which were left in the treasury. It surely can make no difference whether this was actually paid in by the stockholders or had been realized as profits. No amount of refinement can do away with the fact that the necessary capital was in the treasury and remained there.

In addition to this, as noted above, W. L. Wells had loaned the company $10,000, and he, as one of the stockholders, would have been estopped to withdraw that amount from the company, provided it was necessary that the company should have had that sum as capital before it began to do business.

If, as we have argued, the corporation had come into existence either *de facto* or *de jure*, it could make no difference that the capital stock was not issued, or that regular corporate meetings were not held. The witness stated that directors' meetings were frequently held. But, at any rate, if the corporation had had an existence, this existence certainly was not terminated by a failure of the company to have meetings, nor its failure to issue stock, nor by its permitting its stockholders to withdraw a small part of the profits without declaring regular dividends. There is absolutely nothing in the case from beginning to end from which any bad faith on the part of the incorporators is shown, and certainly nothing of which the defendant can complain in view of the fact that the plaintiff company had large profits in the treasury at the time of the transaction out of which the suit arose. It is a singular proposition that the defendant, being admittedly indebted to the plaintiff and on a contract incurred with it in its capacity as a corporation, could now be allowed to defeat the recovery upon the ground that the stock of the plaintiff was not originally paid in. Mr. Justice Brewer passed on this very question in the case of *Coal Co. v. Maxwell, 22 Fed., 197*, where he expressly ruled that after persons had dealt with a company as a corporation, they could not afterwards claim that it was a partnership.

OTHER POINTS INVOLVED IN THE CASE.

It is not deemed necessary by us at this stage of the case to discuss the only remaining point in the case, and the one which was not passed on by the Circuit Court of Appeals, namely, as to whether there was any evidence that the plaintiff company authorized the appropriation of any part of the money due it for cotton to the payment of a stock subscription in another corporation made by W. L. Wells individually, or whether the company had ratified any such appropriation. The written opinion of his Honor, Judge Boyd, disposes of this question, and an examination of the record and of the authorities cited in Judge Boyd's opinion will amply sustain the view taken by him. Besides this, we submit that the plaintiff may rely upon the presumption that the ruling of the Circuit Court is correct, at least in so far as to render it unnecessary to discuss that ruling, which remains undisturbed by the opinion of the Circuit Court of Appeals.